NUMBER 83-791

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE STATE OF TEXAS
Petitioner

v.

JIMMY LOYD MEAD
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR THE RESPONDENT

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OPINION BELOW

The January 12, 1983 en banc opinion of the Court of Criminal Appeals of Texas is reported at 645 SW2d 279 (Tex. Crim. App., 1983).

JURISDICTION

The State of Texas is seeking review of the decision of the Court of Criminal Appeals of Texas under 28 U.S.C. 1257(3). The en banc written opinion of the Texas court below was handed down on January 12, 1983. The State's First Motion for Rehearing in that Court was denied without written Opinion on February 16, 1983, and its Second Motion for Rehearing was denied, also without written opinion, on September 14, 1983.

QUESTION PRESENTED

Whether the Court of Criminal Appeals of Texas correctly applied Witherspoon v. Illinois, 391 US 510 (1968) and Adams v. Texas, 488 US 38 (1980), when it reversed a trial court's exclusion for cause of one venireman who, although opposed to the death penalty, gave clear, definite answers stating he could follow the law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 10 and 19 of the Texas Constitution and Article 37.071 of the Texas Code of Criminal Procedure. The pertinent parts of this article are set out here.

Pertinent Parts of Article 37.017

(b) On conclusion of the presentation of the evidence (at the punishment hearing), the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life. The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

STATEMENT OF THE CASE

The Respondent, JIMMY LOYD MEAD, was convicted of capital murder as a result of an incident involving the death of a police officer. The Jury returned affirmative findings to the special issues provided by Article 37.071, Texas Code of Criminal Procedure, resulting in a mandatory death sentence.

The review of the voir dire examination and exclusion of a prospective juror, Arturo Cabriales Espindola, resulted in the reversal of the Respondent's conviction by the Court of Criminal Appeals of Texas and the remand of the case for a new trial.

The record shows that Venireman Espindola initially stated that he did not believe in the death penalty and, because he "wouldn't like to violate my own beliefs" (Statement of Facts [hereafter SOF] 2225) he could not vote for such punishment (SOF 2227). Although this statement by Mr. Espindola gave an initial indication he would not be able to serve on a death penalty panel, this changed dramatically when the entire trial procedure was explained to the Venireman. After this explanation the attorney for the Respondent asked clear and explicit questions to which Venireman Espindola gave clear, definite answers showing that despite Espindola's feelings about the death penalty he was qualified to serve. The opinion of the Texas appellate court below specifically stated:

1. Although he, himself, did not believe in the death penalty, Venireman Espindola could listen to the evidence and answer all of the special issues or questions.

2. He would render a true verdict according to the law and the evidence.

3. He would not be untruthful in answering the special issues or questions.

The opinion of the Texas Court further noted that Venireman Espindola never said he would not take an oath to render a true verdict or did he ever say he would consciously distort the evidence so as to be able to answer "No" to one or more of the special issues. That Court concluded:

> Although Espindola's feelings toward the death penalty were relevant to allow the State to intelligently exercise a peremptory challenge, that, standing alone, was insufficient reason to warrant the trial court sustaining the State's

challenge for cause. Espindola was not disqualified to serve as a juror in this cause.

REASONS FOR DENYING THE WRIT

This case was correctly decided by the Texas Court below. Further, this decision has neither changed any procedure used in the selection of jurors in death penalty cases nor has it altered the actions or activities of any court or agency. This decision has had no effect beyond that on the specific individual defendant in this action.

A review of the voir dire examination of Mr. Espindola shows it consists of only nineteen pages, found between pages 2218 and 2237 of the record. As noted in Texas court's opinion, and conceeded by the Appellant, Venireman Espindola stated at one point that he did not believe in the death penalty and, because he "wouldn't like to violate my own beliefs" (SOF 2225) he could not vote for such a punishment (SOF 2227). It should be noted, however, these responses were made prior to the Venireman being informed of the actual role of the jury and the details of the procedures under which the jurors would operate (SOF 2228-2231). Indeed, that lengthy explanation of the procedure was prompted by the following exchange between the prosecutor, Mr. Borg, and Venireman Espindola:

> MR. BORG: (Continuing)
>
> Q. Your beliefs are such that in a capital murder case, one where the punishment would be death by lethal injection, that you might have to tell the Court that you could not take the oath to follow the law where the law might require you to give the death sentence by lethal injection, is that right?
>
> A. I would like to clarify that (emphasis added).
>
> Q. First of all, I'm not trying to argue with your beliefs. I'm just trying to get them down--you could not sit on a jury and decide the

facts knowing that the verdict would result in the death of an individual, if you had to decide a certain way, is that right?

A. I would not know what the verdict would be, sir, but I still do not believe in the death penalty.

Q. And, would this belief prevent you from objectively looking at the facts? Would it affect your deliberations and have a profound effect on your deliberations and prevent you from deciding these facts?

A. I need more clarification on that, sir (SOF 2228, emphasis added).

This request for clarification immediately follows the Venireman's statement that he could not vote for the death penalty, which is the main basis for the State's claim that Venireman is disqualified. Thus, the record shows the Venireman immediately backed off or "softened" the initial response elicited by the skillful questioning of the prosecutor.

If necessary, the voir dire of Mr. Espindola should be reviewed in its entirety so as to understand the context in which each of the statements is made. The Respondent, however, would direct the attention of the Court to the following excerpts for its consideration and possible immediate resolution of the issue:

BY MR. KEARNEY (at SOF 2233):

Q. Sir, you understand that before you would even be faced with these questions (the Article 37.071, Code of Criminal Procedure questions at the punishment phase), you first would have to be part of a jury that found a person guilty beyond any reasonable doubt of capital murder. You understand that?

A. I understand that.

Q. And, do you feel like you understand what the questions are that he has read to you?

A. Yes.

Q. First of all, let me ask you if you feel like that you could answer those questions--first of all, before we get into what effect it would

have on you, do you feel like you are the kind of person that could listen to the evidence and answer questions proposed to you?

A. Yes.

Q. You wouldn't have any problem with answering questions?

A. No, I wouldn't.

(An objection by the State to the form of the question is overruled).

MR. KEARNEY (continuing, at 2234):

Q. Second, you understand that if you are on a jury that that--that you would have to give a true verdict according to the law and evidence. You understand that?

A. Yes, I understand that.

Q. And, if the State--the next thing I'll ask you before we get the effect is I will ask you--assume, if you will with me, that the prosecutor proved to you beyond any reasonable doubt that the evidence is there and the questions in your mind, you're convinced beyond any reasonable doubt that the questions should be answered yes, okay?

A. Yes, I understand.

Q. And, you're convinced of that in your mind beyond any reasonable doubt that the answers should be yes, okay?

A. Yes, I understand.

Q. And, would you be untruthful in your answer intentionally and would you just deliberately answer the question untruthful--untruthfully or would you answer the question according to what the evidence showed according to your oath as a juror? Would you just intentionally and deliberately answer the question untruthfully?

A. No, I would not.

(The State here objects to the phrasing of the question and it is overruled).

MR. KEARNEY (Continuing at 2235):

Q. So, you wouldn't answer it untruthfully?

A. I would not answer untruthfully, no way (emphasis added).

Q. So, if you were faced with--the questions that the prosecutor read to you over here, and you either had to answer the questions yes or no, and if you felt in your mind that the answers should be yes, and they have proved that to you beyond any reasonable doubt, and you're required to give a true answer to the questions asked of you, okay?

A. Okay.

Q. Would you, simply because you knew what the effect of your answer would be, simply for that reason, would you deliberately answer those questions untruthful just because you knew what the effect of your answers would be?

A. I said before that I wouldn't answer untruthfully.

MR. WORLEY: Your Honor, we're going to object to the question. It assumes that one, that the venireman won't answer a question--we object; its repetitive. The proper question would be could he answer the question yes if he found beyond a reasonable doubt that should be the answer, not whether he would automatically forswear himself. I don't think the juror should be asked to forswear himself.

THE COURT: I'll sustain the objection.

MR. KEARNEY (continuing at 2236):

Q. Could you--we understand that all people have feelings about the death penalty one way or the other. Could you set those feelings aside and if the Court gave you two or three questions to answer, and you just had to answer them yes or no according to what the evidence is, okay?

A. Okay.

Q. And, could you set those feelings aside and look at the evidence if the Court instructed you to and look at the evidence and answer the questions truthfully based on the evidence. Could you do that?

A. I could answer the questions truthfully, yes. But, I could not put my feelings aside the way that I feel.

Q. Well, if you have got those feelings that's something that everybody has, but when it comes down to answering the questions yes or answering the questions no, and you felt that the prosecutors proved to you beyond any reasonable doubt in your mind that the answers to the questions should be yes, okay?

A. I understand.

Q. Would you answer the questions yes?

A. Yes, I would.

Q. And, if they didn't prove to you that the answers should be yes beyond any reasonable doubt, would you answer the questions no?

A. - That's right (This concludes the voir dire of Mr. Espindola, at SOF 2236).

Thus we find the following:

- The three special issue questions required in capital cases were read to the Venireman (SOF 2229-30).
- The Venireman understood these questions (SOF 2233).
- The Venireman could answer each of the questions "without any problem" (SOF 2233).
- The Venireman knew he must be truthful in answering these three questions (SOF 2234).
- The Venireman would not let the effect of his answers (the death sentence) affect his ability to answer each question truthfully (SOF 2235).
- If the State proved beyond a reasonable doubt that the special issue questions should be answered "yes", he would truthfully answer the questions (SOF 2234-35).
- Although the Venireman would not abandon his personal beliefs about the death penalty, he would answer the special issue questions truthfully (SOF 2236).

As noted above, this case was correctly decided by the Texas Court below. The question brought forward to this Court by the Attorney General was already considered by the Texas Court and rejected in its initial opinion of January 12, 1983. The same matter was re-urged and rejected when the Texas Court denied the State's First Motion for Rehearing on February 16, 1983 and again when it rejected the State's Second Motion for Rehearing on September 14, 1983.

This case basically raises factual issues in that the State is merely complaining about the application of well established and widely recognized law to the specific facts of this case. For examples of instances in which the Texas Appellate Court ruled for the State and found that a venireman's statement regarding his ability to answer the 37.071 questions did not rise to the necessary level see O'Bryan v. State, 591 SW2d 464 (Tex. Crim. App., 1979) at 471; Porter v. State, 629 SW2d 334 (Tex. Crim. App., 1981) at 377 and Vigneault v. State, 600 SW2d 318 (Tex. Crim. App.,

1980) at 326. An example of a case, similar to this instant one, in which the Texas Appellate Court ruled against the State and found the answers of a venireman did show she was qualified to serve, is Turner v. State, 635 SW2d 734 (Tex. Crim. App., 1982). Thus it is seen that this instant case raises no new issue or rule but rather is only the application of an established rule to the particular facts of this case.

A review of the questions of Mr. Espindola shows there is no question to be resolved by this Court. The record is quite clear that Mr. Espindola was qualified under Witherspoon v. Illinois, 391 US 510 (1968) to serve on a death penalty jury. Mr. Espindola stated that he would neither blindly vote against the death penalty nor would he make a conscious distortion of the facts because of his personal beliefs regarding the death penalty. See also Pierson v. State, 614 SW2d 102 (Tex. Crim. App. 1980). Mr. Espindola was thoroughly familiar with the procedure in death penalty cases, he knew the responsibilities of the jurors, he knew the questions that would be asked of the jurors, he understood these questions, he knew the effect of the jurors' answers to these questions and, although he was personally opposed to the death penalty, he could and would answer the questions truthfully based on the evidence adduced at this trial (SOF 2234-36).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ORIGINAL

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JIMMY LOYD MEAD
Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, JIMMY LOYD MEAD, asks leave to file the attached Respondent's Brief in Opposition to the Petition of the State of Texas for a Writ of Certiorari to the Court of Appeals of Texas without prepayment of any costs and to allow him to proceed in forma pauperis pursuant to Rule 46.

The Respondent was found to be indigent by Criminal District Court Two of Tarrant County, Texas and attorneys were appointed to represent him on this case at both trial and on appeal.

The Respondent's Affidavit in support of this Motion is attached hereto.

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ATTORNEY FOR THE RESPONDENT

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AFFIDAVIT

I, JIMMY LOYD MEAD, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis and without being required to prepay costs or fees:

1. I am the Respondent in the above entitled cause.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that the State of Texas is not entitled to the redress they seek in said cause.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently employed. I have been incarcerated by the State of Texas continuously since February, 1979.

2. I have not received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

3. I do not own any cash or checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. I have no dependents other than myself.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Jimmy L. Mead
JIMMY LOYD MEAD

THE STATE OF TEXAS §
§
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority on this day personally appeared JIMMY LOYD MEAD and stated to me that the above and foregoing Affidavit is true and correct.

SIGNED this 13 day of December, 1983.

Commission Expires
4-1-85

Darwin L Wilder
DEPUTY DISTRICT CLERK
Notary Public
Tarrant Co Tx